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No. 98-1407

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1998

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DONALD P. HUMPHRESS,

*Petitioner,*

*versus*

UNITED PARCEL SERVICE, INC. and GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 89,

*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## RESPONDENT UNION'S BRIEF IN OPPOSITION

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## RESPONDENT UNION'S BRIEF IN OPPOSITION

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### COUNTERSTATEMENT OF THE CASE

#### 1. Nature Of The Case

Petitioner, Donald P. Humphress, filed this action March 8, 1996, against his employer, United Parcel Service, Inc. ("UPS"), and his Union, General Drivers, Warehousemen & Helpers, Local Union No. 89 ("Local 89"). The Complaint listed six separate claims under state and federal law.

Local 89 is the exclusive bargaining representative for a unit of UPS employees of which Donald Humphress is a member. Local 89 will focus on the three claims asserted

against the Union, all of which are based on Local 89's representation duties.[1]

### 2. Course Of Proceedings

The present dispute arose from Humphress' unsuccessful and improper attempt to "reinstate" a grievance he had withdrawn concerning UPS' removal of a modified gearshift on the package car he normally drove. A joint committee of UPS and Union representatives denied Humphress' so-called "reinstating grievance" because it was previously withdrawn by him as settled.

The District Court concluded that the essence of Humphress' complaint was that UPS failed to comply with the settlement obligation to install a gearshift which would alleviate his pain. (Appendix to Petition, A22). Humphress never filed a grievance alleging failure to comply with the prior settlement.

When Local 89 learned of Humphress' effort to reinstate his earlier grievance, it informed him that he needed to modify his grievance to allege, instead, that UPS had failed to abide by the settlement[2] which would then have been processed as a new grievance. Humphress ignored Local 89's advice and refused to file a modified grievance or to appear at grievance meetings. Instead, Humphress

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[1] The claims against Local 89 were: (1) a "hybrid-Section 301" action pursuant to 29 USC § 185, alleging UPS breached collective bargaining agreements and the Union breached its duty of fair representation; (2) a state law claim of intentional infliction of emotional distress; and (3) a state law claim based upon an implied covenant of good faith and fair dealing.

[2] UPS had previously removed a modified, bent shifter to install a 25 inch straight shifter mandated for all UPS vehicles. UPS subsequently made a number of attempts to install shifters in Humphress' vehicle, none of which satisfied Humphress.

filed this action without exhausting the contract's grievance and arbitration procedures.

### 3. Disposition In The Courts Below

On motions for summary judgment, the District Court dismissed all of Humphress' claims[3] (Pet., A8). The District Court found that Donald Humphress failed to exhaust the contractual grievance procedure as a prerequisite to filing this action and that various state law claims were preempted by federal labor law because the resolution thereof required the interpretation of the collective bargaining agreement (Pet., A22, A24, A26, A27). The District Court found Local 89 did not breach its duty of fair representation and, in fact, *had* "processed . . . [Humphress'] grievances despite his failure to participate" (Pet., A21). Finally, Humphress' allegations concerning intentional infliction of emotional distress fell short of the standard for outrageous conduct (Pet., A26).

The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court and adopted its findings. The Court agreed Humphress had failed to exhaust mandatory grievance and arbitration procedures. Moreover, Humphress did not establish that exhaustion would have been futile or that an unfavorable result was caused by arbitrary, discriminatory, or bad faith conduct by the Union (Pet., A4-A5).

The Court of Appeals also rejected the claim for intentional infliction of emotional distress for failure of proof of outrageous conduct required under Kentucky law (Pet., A4, n. 13).

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[3] The District Court dismissed the state law discrimination claim without prejudice, after dismissing all other claims on the merits.

## 4. Counterstatement Of Facts

The following facts are either undisputed or admitted by Humphress, or they are effectively uncontroverted on the record on summary judgment.

Donald M. Humphress is a package car driver employed by UPS, and a member of Local 89. UPS and Local 89 are parties to two Collective Bargaining Agreements covering a bargaining unit which includes Humphress' position at UPS.

Humphress is employed by UPS at its Service Center in Campbellsville, Kentucky. He had worked for UPS for over 27 years. This dispute arose out of Humphress' desire to change the gearshift in his package truck because he was experiencing elbow pain. Some years ago, he had obtained a modified shifter with his Center Manager's permission.

Around February, 1994 Humphress' package truck was placed in the body shop for repairs. While it was being repaired, Humphress was given a backup vehicle, number 40838, to drive temporarily. Vehicle 40838 was a "fill in" vehicle, added on to runs whenever a vehicle was needed. While not the best in appearance, the vehicle was mechanically sound according to the mechanic, the mechanic supervisor, and the Center manager.

Humphress' wrote an extensive report of alleged defects ("DVIR") on vehicle number 40838. The *manner* in which it was written, offering opinions rather than facts, elicited a response from the mechanic, Steve Hughes. David Clark, the mechanic supervisor, reviewed Humphress' DVIR on vehicle 40838 and felt it was inflated. He believed Humphress was upset, not because of the problems with 40838, but because his normal vehicle was taken out of service and he was forced to drive another vehicle.

When Humphress' regular package truck was returned from the body shop and placed back into service, he noticed that the gearshift had been changed. Before it had been placed back into service, the mechanic, Steve Hughes ("Hughes"), had changed it to the manufacturer's original equipment specifications. Unknown to Humphress, UPS's Regional Automotive Manager, Larry Combs, had ordered this change when he ordered the Campbellsville Center to return *all* of its vehicles to original manufacturer equipment specifications.

Humphress alleges that, after he wrote up his report on vehicle number 40838, Hughes began to harass him. He made Center Manager, Vince Elliott ("Elliott"), aware of his complaints. When Elliott received the report, he personally made an investigation. Moreover, Elliott turned Humphress' complaints over to UPS's Loss and Prevention Division to investigate the complaints, who found nothing.

Humphress also went to Hughes' supervisor, David Clark ("Clark"), to complain about Hughes. Clark testified that he was unable to find any proof to substantiate Humphress' charges. He testified that finding excess oil or grease is normal because of the preventive maintenance inspections. Moreover, according to Hughes, grease buildup had always been a problem on the vehicles. Larry Wolfe, Local 89's agent in charge of the account at the time, also made an investigation. He reported the complaints to the Center Manager. He also surveyed the other drivers to see if they had similar complaints. No similar complaints were received by him or the Center Manager.

Humphress was assured, both by UPS and by Local 89, that, if a mechanic or anyone else was caught sabotaging the vehicles, that individual would be discharged.

Humphress filed a grievance on April 3, 1994, asking that he be given a modified gearshift, that the Employer hold safety meetings, and that Hughes be disciplined.

Under the Collective Bargaining Agreement, all grievances, whether safety related or otherwise, must be processed through the same grievance procedure. It is a five (5) step process requiring the grievant to first discuss his problem with the supervisor and, if not satisfied, to reduce it to writing to be heard before a local level panel. If a resolution is not reached at the local level, it is then heard before a state panel. If the state panel is unable to resolve the grievance, it is then heard by a joint area committee and, if not resolved, it is forwarded to a national panel. If the national panel is unable to resolve the dispute, it is sent to final and binding arbitration. The panel in each of the circumstances is comprised of equal numbers of Union and Employer representatives.

Grievances can be settled or withdrawn at any point during the grievance process. However, *once a grievance is withdrawn, it cannot be reinstated.* A grievance can, however, be placed on "hold" while the parties attempt to work out the problem and, in the event it is not resolved, returned to its prior position in the grievance process.

When Hughes learned that Humphress had asked in his grievance that he be disciplined, Hughes filed an intra-Union complaint.[4] Prompt notice of the filing of the intra-Union complaint was given to Humphress. Humphress admittedly understood that Hughes could be upset because he had asked in his grievance that Hughes be disciplined. He further understood that, once the intra-Union complaint had been made, if the charging party insisted, it must be processed. He was also aware that Hughes was alleging that Humphress had falsified information about him.

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[4] Under the By-laws of Local 89, any member having a complaint against a fellow member can file a complaint with the Local Union Executive Board. One possible result would be expulsion of the offender from Local 89.

When Larry Wolfe, Local 89's agent, was in Campbellsville in early September or late August, Humphress approached him, attempting to find out what could be done to get the intra-Union complaint against him dismissed. He was told by Wolfe that, as long as Humphress was attempting to get Hughes fired, it would probably not be dismissed. Humphress asked Wolfe if the intra-Union complaint would be dismissed if he withdrew his grievance. At that time, Wolfe was relatively new to the UPS account and had never talked to and did not know Steve Hughes. Because of this, Wolfe told Humphress that he did not know if Hughes would withdraw his grievance but that he would talk to Hughes about dismissing it under those circumstances. Humphress testified he then asked Wolfe if he would withdraw the grievance, but Wolfe told Humphress that he would have to do it *personally*.

*Humphress* then went to the Center manager's office and *withdrew his grievance*. Wolfe then secured Hughes' home telephone number from the UPS Center and called Hughes, making arrangements to meet him. Although reluctant to do so at first, Hughes eventually withdrew his intra-Union complaint.

Wolfe denies that he made any "agreement" with Humphress or UPS about the withdrawal of Humphress' grievance. He did, however, attempt to get Humphress some assistance. He talked to UPS about giving Humphress an automatic transmission vehicle, but the Company would never agree to do so. There was never any agreement by Wolfe, however, to get him a "suitable" shifter. That decision was solely within the control of UPS.

Attempting to help Humphress, Wolfe reviewed Humphress' grievance and discovered that Humphress had never sought medical attention to substantiate his alleged elbow problem. Consequently, he advised Humphress to see a physician so that the Union would have evidence to

substantiate his complaints. Humphress followed Wolfe's advice and saw Dr. Norman Lewis, an Orthopedic surgeon, on three occasions.

After being successful in getting Humphress to seek medical attention, Wolfe secured the medical information and contacted UPS to get assistance for Humphress' elbow problem. Armed with a letter from Dr. Lewis outlining Humphress' problem, Wolfe secured a commitment from UPS to try to help Humphress. Its commitment was in writing and was received by Humphress.

After making the commitment to help Humphress, UPS made multiple efforts to get a shifter in Humphress' package car that would work to his satisfaction. After UPS was unable to satisfy Humphress, and *unknown to Local 89, Humphress attempted to reinstate the grievance that he had withdrawn.*

Local 89's first knowledge that Humphress had attempted to reinstate his grievance was when it was received by Wolfe at his office, having been mailed to him by the steward. At that time, Wolfe told the steward that the wrong grievance had been filed. Humphress was also told this.

The "reinstating grievance" was processed through a local level hearing where it was deadlocked to the state panel. Humphress, however, *did not appear* at the local hearing. The hearing was continued twice because of his nonappearance. When he did not appear on the first occasion, the Union sent a certified letter to him to insure that he knew the grievance was going to be heard. Humphress testified he did not appear, despite claiming he was very interested in his grievance, because he would not be paid for time off. The Union felt Humphress would have been of some assistance at the local meeting and clearly wanted him there. When the grievance was deadlocked to the

state panel, both Humphress and Nichols, his steward, were advised that the grievance was going to the state panel.

Humphress' attempted "reinstating grievance" was dismissed by the state panel for procedural reasons, because it had been previously withdrawn as settled by Humphress. Wolfe told the steward, Kenny Nichols, what had occurred at the state meeting. The steward testified that he told Humphress about the decision either the day following the day that he learned of it, or the first of the following week.[5]

After the attempted grievance was dismissed, Wolfe tried to get Humphress file a modified grievance in order for the settlement breach issue to be heard. Wolfe told Humphress that his grievance should have been that the Employer had agreed to work with him to alleviate his elbow problem, but that it was not holding up to its promise. Wolfe talked with the steward about how to properly file the grievance, who also told Humphress. *Humphress was specifically advised that he had a right to file a grievance on the fact that UPS was not abiding by its agreement to help his medical problem.* Wolfe was confident that, if the grievance was filed properly, there would be no procedural defects and the grievance would be heard.

Humphress ignored the Union's advice as to how properly to file his grievance and refused to file one. He felt that it would take too long to process the grievance and would have the same result. The steward told Humphress how to file the grievance, but Humphress told the steward that it was "too late". Rather than filing a grievance to resolve his problem, Humphress chose to file this action. In the Complaint, he alleges that Local 89 breached its duty

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[5] Since UPS also knew about the dismissal, it would be possible that Humphress could learn the result from UPS. However, Local 89 did timely inform Humphress.

of fair representation to him, "conspired" with UPS to permit health and safety violations and to allow UPS to violate his contractual rights, was hostile toward him because of his past support of competing candidates for International Union office, and, because of its criticism of him as a steward, that negotiations regarding his grievance were spurious, were carried on in bad faith, and were designed to give the false impression of sincerity, and that Local 89 wrongfully and intentionally inflicted emotional distress on him and breached an implied covenant of good faith and fair dealing. All of the allegations are without any factual basis.

## SUMMARY OF THE ARGUMENT

Donald Humphress filed this action after bypassing and refusing to exhaust the grievance and arbitration procedures mandated under the applicable collective bargaining agreements. Humphress sued for breach of contract and breach of the duty of fair representation and asserted various claims under state law.

Humphress' Petition argues that the Court should focus on the dismissal of his procedurally defective "reinstating grievance" as satisfying the exhaustion requirement and ignore his refusal to use the grievance process to assert a proper claim of breach of his prior settlement. This action was filed to circumvent the contract procedure in blatant disregard of the Union's reasonable advice.

Humphress never filed the new grievance but filed this action instead. He cannot maintain this "hybrid Section 301" action because he failed to exhaust his contractual remedies. The Courts below correctly applied the law and found there was no legal excuse. Humphress did not even attempt to grieve UPS' failure to abide by the settlement of his first grievance.

Moreover, Humphress failed to establish any breach by his Union of its fair representation duties or that the process was "seriously flawed" by any improper conduct by Local 89. Local 89 actually pursued Humphress' grievances and notified him as to how to proceed with the subject grievance.

The Court of Appeals properly affirmed dismissal of Humphress' state law claims as preempted by federal labor law because they would require interpretation of the collective bargaining agreements.

## ARGUMENT

### I. The Court of Appeals Correctly Applied the Summary Judgment Standard.

The Hon. Thomas B. Russell, Judge of the United States District Court, dismissed all claims against Local 89, upon motion for summary judgment, determining that Humphress had failed to establish a genuine issue of material fact and that Local 89 was entitled to judgment as a matter of law. The Court of Appeals affirmed.

Humphress' present brief simply clouds the issues by asserting numerous unsupported supposed "facts" and various conspiracy theories. However, the bottom line is that these allegedly conflicting points are not material, since they would not affect the outcome. Humphress' claims were dismissed either because he failed to establish an essential element or because they were state claims preempted by federal labor law.

Under Rule 56(c), FED. R. CIV. P., summary judgment must be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party would bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since *a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.*"

*Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986) (emphasis ours).

In *Celotex*, this Court elaborated on the respective burdens of proof under Rule 56 and explained that a litigant moving for summary judgment who does not have the burden of proof on a claim is not required to support the motion with evidence. *Id.* at 324. All a party filing a motion for summary judgment must do to carry its burden is to point out that there is a lack of evidence to support the nonmovant's case. *Id.* at 325. This burden is satisfied by informing the Court why it believes summary judgment is appropriate and by identifying those portions of the pleadings, discovery, and affidavits which indicate the absence of a genuine claim. *Id.* at 323. *Celotex* requires the opposing party to designate *specific facts* supported by discovery or affidavit showing there is a genuine issue for trial. *Id.* at 324.

A nonmovant's burden is not satisfied simply by showing that there is "some metaphysical doubt as to material fact"; instead, the nonmovant must show that the record could support a finding by a "rational trier of fact" in support of the nonmovant. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In *Anderson* v. *Liberty Lobby, Inc.*, the Court defined a "material issue" of fact as one which would affect the out-

come of a lawsuit. 477 U.S. 242, 248. The issue of "genuineness" focuses on whether there is sufficient evidence for a reasonable jury to obtain a verdict for the nonmovant party. *Id.* at 248.

> "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted."

*Id.* at 249-50.

In order to prevail in this action, Humphress had to establish UPS breached the collective bargaining agreement, that thereafter Local 89 acted toward him arbitrarily, discriminatorily, or in bad faith with regards to such breach, materially affecting the outcome, and that the within action was filed within six months after he knew, or should have known, of Local 89's alleged improper action. After an adequate time for discovery, Humphress could not produce any evidence which showed that UPS breached the collective bargaining agreement. Moreover, no facts existed to support his claim that Local 89 breached its duty of fair representation substantially impacting the outcome. The Court of Appeals correctly held that Humphress' failure to exhaust contractual remedies precluded him from maintaining this action.

## II. The Court Of Appeals Properly Affirmed Dismissal Of Humphress' Hybrid Section 301 Claim.

Humphress' primary claim is brought under 29 USC §185 (a) as a "hybrid section 301" action. It is well established that, in a hybrid 301 action such as the present action, there can be no recovery unless the Plaintiff-Appellant can prove *both* that the Employer violated the collective bargaining agreement and that the Union breached its duty of fair representation. *Hines* v. *Anchor Motor*

*Freight, Inc.*, 424 U.S. 554, 570 (1976); *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 62 (1981); *Clayton* v. *Automobile Workers*, 451 U.S. 679, 683, n. 4 (1981); *Wood* v. *Local 406*, 807 F. 2d 493 (6th Cir. 1986), *cert. denied*, 483 U.S. 1006 (1987). A breach of the union's duty of fair representation only occurs when the union's conduct toward a member is arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). As will be pointed out hereafter, Humphress was unable to establish either of these claims.

### A. THE APPEALS COURT CORRECTLY CONCLUDED HUMPHRESS HAD FAILED TO EXHAUST THE CONTRACTUAL GRIEVANCE PROCEDURE, THUS BARRING THIS ACTION.

A hybrid Section 301 action against the Employer and the Union cannot be brought unless a plaintiff has first exhausted all grievance and arbitration remedies provided in the collective bargaining agreement. *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Hines* v. *Anchor Motor Freight, supra*; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).

In the instant case, the Union tried repeatedly to get Humphress to modify his grievance so that it could be heard by the panel. He openly resisted this attempt. He was specifically told by Wolfe, after his grievance had been dismissed, how to correct the problem and file a grievance that would be heard to resolve his complaint. He refused to do so, commenting that it was "too late".

The Petitioner openly acknowledges that he refused to file a grievance as directed by the Union. Dismissal is, therefore, appropriate for his failure to exhaust available remedies.

The Sixth Circuit had dealt with a similar issue in *Winston* v. *General Drivers, Warehousemen & Helpers,*

*Local 89*, 93 F.3d 251, (6th Cir. 1996). In affirming the dismissal of the plaintiffs' claim therein, the Sixth Circuit, citing *Clayton*, supra, and *Wagner* v. *General Dynamics*, 905 F.2d 126 (6th Cir. 1990), held that the exhaustion of contractual grievance procedures is *always* required. *Winston*, at 255.

Similarly to the present case, the plaintiffs in *Winston* had ignored their Union's advice to file a grievance raising the specific issues with which they were concerned so it could be considered through the normal grievance process. Instead, they *tried to bypass the contractual remedies* and went straight to court. The Union did not have the opportunity to present the specific grievance and seek the relief provided under the normal contract procedures. See *Winston*, at 255.

Despite the Union's encouragement and advice, *Humphress did not file a grievance which would have resolved his problem*. Apparently, it is something he did not even consider, according to Humphress' own words in his deposition. Regardless of whether Humphress "thought of it", the proper procedure was for him not to attempt to "reinstate" a withdrawn grievance, but to file a grievance that the Employer had not supplied a suitable shifter as it had agreed to do. Accordingly, this claim properly was dismissed.

## B. OTHER ADEQUATE GROUNDS SUPPORTED DISMISSAL OF THE HYBRID SECTION 301 CLAIM.

### 1. Humphress Cannot Establish UPS Breached the Contract.

The evidence overwhelmingly establishes that the change of gearshifts in Humphress' package car was done, not to cause him harm, but pursuant to UPS policy to maintain or restore original manufacturer's equipment for safety purposes.

Steve Hughes, the mechanic that changed the gearshift, testified that he had been told to change out *all* gearshifts that were not original manufacturer's equipment. At that time, about half of the fleet at Campbellsville had modified shifters. The gearshift changeovers were done a few at a time in order to control the cost. Humphress' gearshift was the first one changed because it had just come back from the body shop. The changeovers were done throughout the entire district, not just in Campbellsville.

The changeover in the gearshifts was brought about at the direction of the Regional Manager who came to the district and found one that was outside specifications. The reason for the changeover was for safety. According to Dave Clark, the mechanic supervisor, heating the shifters to bend them so as to modify them makes the metal brittle, with the attendant potential that they could break off in an accident, injuring someone.

The evidence established that UPS strives to maintain its vehicles according to original manufacturer's specifications. The UPS policy is that, whenever preventive maintenance inspections are performed, anything not found to be original manufacturer's equipment is to be corrected.

The collective bargaining agreement clearly allows the mechanic to determine the safety of a vehicle.

The changeover was clearly made, not to harm Humphress, but to insure the safety of the vehicle. This right is given to UPS in the collective bargaining agreement. Accordingly, Humphress cannot show that the Employer violated the collective bargaining agreement in changing out the gearshift.

**2. Humphress Failed As A Matter of Law To Show Conduct By Local 89 Breaching Its Fair Representation Duty.**

In *Air Line Pilots' Ass'n* v. *O'Neill*, 499 U.S. 65 (1991), this Court held that, to establish that the union breached its duty of fair representation, the plaintiffs must show that the union's action were "so far outside a 'wide range of reasonableness' that they rise to the level of irrational arbitrary conduct." *O'Neill* made clear an extremely deferential standard should be applied and that a court should not substitute its judgement for that of the Union, even if with hindsight it appears the Union could have made a better call. That same deference applies to a union's actions in the context of grievance handling. See *Walk* v. *P*I*E Nationwide, Inc.*, 958 F.2d 1323 (6th Cir. 1982).

Based upon the facts in this case, it is obvious that Local 89's representation of Donald Humphress was not "outside a wide range of reasonableness" and that there was no breach of the duty of fair representation.

Nowhere has Humphress shown that the handling of his grievances was done arbitrarily, discriminatorily, or in bad faith. In his first grievance, he asked for three things to be resolved: (1) his shifter be modified; (2) Steve Hughes be disciplined; and (3) the Company begin safety communications. Notwithstanding his allegations, Humphress admitted that the Union could not make the Employer engage in safety communications. He further *agreed that the Union did not have the authority* to direct what pieces of equipment could be used, or could not be used, determine what type of equipment would be purchased, the standards on whether or not the equipment was roadworthy, to determine the configuration of the vehicles or when to replace them, *or to force the Employer to put a gearshift in the vehicles as each individual or the Union may want.*

This is precisely why Wolfe told Humphress that he needed to get to a physician to be able to substantiate his allegations of elbow pain caused by the shifter. It was only with that information that the Union would have an opportunity to get the situation addressed by UPS.

Humphress alleges that Local 89 did not properly represent him in his first grievance, stating that it did not investigate.[6] He acknowledged, however, that there was nothing to investigate and that the panel got all the information or facts pertinent to the case. At no time did Humphress ask any of the agents for Local 89 to present his case for him, because he admits he had gone to the meeting with the expectation of presenting it *himself* and did, in fact, present all the facts.

With Humphress' admissions, it is obvious that the panels had all the information that could be pertinent to his claim. This is a moot point, however, since he personally *withdrew* it.

Humphress also alleges that Local 89 was "insincere" in the processing of his grievance, based solely on the results. He could point to no other factor. He admitted, however, that as far as anyone could tell, everything done by Local 89 on his behalf was done with sincere effort. Similarly, Humphress' allegation that Local 89 agreed not to oppose the Company's position in this matter is speculation based solely upon the results rather than facts.

Humphress was familiar with the collective bargaining agreement as a result of his having been a steward and having read it many times. He acknowledged that, once a

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[6] The allegation of a breach of the duty of fair representation regarding the first grievance is clearly barred by limitations as it was withdrawn more than six months prior to the time the Plaintiff brought this action. *DelCostello*, supra.

grievance was settled, it could go no further and nothing else could be done with it.

Notwithstanding this knowledge, Humphress attempted to reinstate his grievance. At no time did he discuss it with his business agent, or anyone else with the Union, prior to filing it. He admitted that no one told him that he could reinstate it. In fact, when his business agent learned of the reinstatement, he notified Humphress that the wrong grievance had been filed. Despite this, Humphress refused to correct the grievance.

Again, despite his experience as a steward, Humphress alleges that he believed his grievance was going directly to the national panel. This is obviously in error for a number of reasons, all *known* to Humphress. First and foremost, there is no contractual method to bypass the grievance procedure. Secondly, when Humphress did not appear for the local level meeting, he was sent certified mail by the Union in an attempt to get him to participate.

Finally, the state panel to which the second grievance was deadlocked meets *regularly* on the third Thursday of each month. This was a date that Humphress was familiar with, having served as a steward. Moreover, having received notice that the grievance was at a local level hearing, he would have known that the next step would be the state panel. Lastly, Humphress and the steward were both told that the grievance would be heard at the state panel after it was deadlocked.

Local 89 did all that it could to get Humphress to participate in his own grievance. Yet, he chose not to participate. Certainly, nothing in the actions of Local 89 in the processing of the grievance could be reasonably construed as being arbitrary, capricious, or done in bad faith.

In order to justify his claims of Local 89 breaching its duty of fair representation, Humphress alleges, without

any factual basis whatsoever, that Local 89 "conspired" with UPS on various matters.

As set forth in the preceding discussion, Humphress' second grievance could not automatically under the contract go to the national panel. Humphress would have known this from the receipt of the certified letter from Local 89. Moreover, the fact that the grievance had previously been withdrawn was fatal to it, and Humphress was told of this *prior to any hearing on the matter.*

Humphress acknowledged in his deposition that he had no factual basis for his allegation that there is or ever was a conspiracy between Local 89 and UPS as he alleged. He admitted he had no evidence of any communications between Local 89 or UPS to "permit" UPS to have health and safety violations. Likewise, he had absolutely no knowledge of any facts that any agent for Local 89 ever conspired to discriminate against him for asserting his contractual rights, for making claims, or regarding his age. Furthermore, he acknowledged there was no evidence that there were any communications "by negotiations" about his grievance, except in the presentation of his grievance at the respective panels.

Humphress also alleged that Local 89 was secretly hostile toward him and attributes the dismissal of his grievance as caused in part by such hostility. He alleges that Local 89 was hostile toward him because he supported Ron Carey as President for the International Teamsters. He made his allegations without knowing whether any of the Union officers supported Carey's leadership or how they voted in the International election. In fact, he acknowledged that, totally contrary to what he was alleging, the president of Local 89 *supported* Ron Carey and was a candidate on Ron Carey's slate for office.

Humphress alleged that the hostility was also because he was once a candidate to be a delegate to the Interna-

tional convention on a slate which opposed some of the local Union officers. He acknowledged that he later learned that some of the individuals on that slate supported the same candidates for International office as did he. Again, he is unable to explain why this would have caused any hostility which resulted in the grievance being dismissed as having been previously withdrawn.

Lastly, Humphress alleged that Local 89 was secretly hostile to him because of criticism he received. He could not point out anyone at Local 89 who had criticized him, but claimed his business agent did not want him to know anything.

Humphress could not produce any credible factual basis for his allegations that Local 89 treated him differently than any other member, made anything but sincere efforts to help resolve his problem, or acted in any way toward him except in the attempt to assist him in good faith.

### 3. Humphress Cannot Show The Union's Conduct Tainted The Grievance Process Or Substantially Impacted The Outcome.

In addition to showing Local 89 acted in bad faith or in an arbitrary or unreasonable manner, to prevail Humphress must show the Union's alleged breach so tainted the grievance process that it substantially impacted the outcome. See *Dushaw* v. *Roadway Express, Inc.*, 66 F.3d 129, 132 (6th Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 1353 (1996) (reversing judgment against union and employer in hybrid Section 301 action), citing *Black* v. *Ryder/P*I*E Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994); see also *Wood* v. *Local 406*, 807 F. 2d 493, 500 (6th Cir. 1986), *cert. denied*, 483 U.S. 1006 (1987).

A plaintiff claiming unfair representation must prove that the grievance process was

> " . . . *seriously flawed* by the union's breach of its duty to represent employees honestly and in good faith and

> without invidious discrimination or arbitrary conduct."

*Black* at 585, quoting from *Hines*, 424 U.S. at 570. Thus, even if Local 89 failed to present evidence for Humphress during the grievance process, which has not been shown here,

> " . . . this failure may constitute a breach of its duty only if that evidence probably would have brought about a different decision."

*Black* at 585; see also *Taylor* v. *Ford Motor Co.*, 866 F. 2d 895, 898-99 (6th Cir. 1989).

In the present case, Local 89 pursued the initial grievance and tried to satisfy Humphress. Based thereon, UPS made several attempts to replace the gearshift on Humphress' vehicle but failed to satisfy Humphress. When Local 89 learned Humphress wanted to "reinstate" his previous grievance, the Union advised him the proper procedure was to file a new grievance alleging UPS breached its previous agreement by which the old grievance had been settled and withdrawn.

Humphress refused to file the grievance and ignored Local 89's correct advice and the contract procedures. Doing it "his way", all Humphress got was a panel ruling rejecting his effort to "reinstate" the old grievance, predictably, because it had been withdrawn as settled.

Humphress is unable to show, under these circumstances, that Local 89's conduct "tainted" the grievance procedure, much less that a breach of duty by Local 89 substantially impacted the outcome.

**4. Humphress' Case Law Is Readily Distinguishable.**

Humphress cites a number of old fair representation cases to support his arguments. He relies heavily on the pre-*O'Neill* Seventh Circuit decision in *Thomas* v. *United*

*Parcel Service, Inc.*, 890 F. 2d 909 (1989), which, he claims, involved "virtually identical facts" (Pet., 15-16).

While it is true that *Thomas* involved UPS and a Teamster local, the plaintiff in that case *had* exhausted the grievance procedure, so that dispositive ground was not in issue. Moreover, the *Thomas* court did not consider the requirement that the union's conduct be shown to have tainted the grievance process.

At most, *Thomas* holds under those circumstances that material issues of fact precluded summary judgment. *Id.* The disputes raised by Humphress are not material to the outcome because he cannot maintain this action as a matter of law. *Celotex*, 322-23. Moreover, the Seventh Circuit's view of fair representation claims espoused in *Thomas* is not consistent with this Court's 1991 clarifications in *O'Neill*.

## III. HUMPHRESS' STATE TORT CLAIM OF OUTRAGE WAS PROPERLY DISMISSED.

Humphress brought a claim of intentional infliction of emotional distress under Kentucky law, based upon alleged "harassment" by UPS and Local 89. As it concerns the Union, the outrage claim is based on nothing more than the allegedly unfair or inadequate representation by Local 89.

Humphress cannot establish the essential elements for the tort of outrage claim against Local 89. He alleges Larry Wolfe intentionally caused him harm by "allowing" UPS to make use of the gearshift that aggravated Humphress' elbow. No one, viewing the factual circumstances, could ever reasonably come to the conclusion that Wolfe intentionally tried to harm the Plaintiff. UPS' policies regarding equipment and its removal of the gearshift are matters outside Wolfe's control. Moreover, it was Wolfe who told Humphress how to correctly file a grievance so it

could be processed and heard under the contract. Humphress is unable to show any type of intentional, extreme, or outrageous conduct on the part of Local 89 to support his claim.

### A. Humphress' Emotional Distress Claim Is Preempted by Federal Labor Law.

Donald Humphress' emotional distress claim is based on nothing more than the same facts relied upon for his hybrid Section 301 claim. Interpretation of clauses of the collective bargaining agreement, including but not limited to grievance and arbitration procedures and management rights, are essential to resolving the merits of the emotional distress claim. Accordingly, his claim for intentional infliction of emotional distress is preempted and must be dismissed as a matter of law. *Allis-Chalmers* v. *Lueck*, 471 U.S. 202 (1985); *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. 399 (1988).

The Sixth Circuit had been faced with a similar array of claims brought under state law in another action also involving a hybrid Section 301 claim. In *In Re: Glassworkers, Local No. 173*, 983 F.2d 725 (6th Cir. 1993), the Court observed that Section 301 of the Labor Management Relations Act, 29 USC §185, to insure uniformity in the area of federal law, has been held to preempt state law claims that are substantially dependent upon an analysis of a collective bargaining agreement. The Court more specifically observed:

> "An action for breach of duty of fair representation that directly implicates the grievance provisions of a collective bargaining agreement 'clearly falls within the ambit of section 301 preemption.'"

983 F.2d 725, 728 (6th Cir. 1993), quoting in part from *Fox* v. *Parker Hannifin Corp.*, 914 F.2d 795, 802 (6th Cir. 1990).

### B. Donald Humphress Cannot Establish the Essential Elements for the Tort of Outrage.

It is abundantly clear that the essential elements of the tort of outrage cannot be established by Humphress, as the Court of Appeals held (Pet., A6-A7). Humphress has not alleged any type of intentional, extreme, or outrageous conduct on the part of Local 89, which is an essential element of his claim. See *Craft* v. *Rice*, 671 S.W.2d 247 (Ky. 1984).

Moreover, Humphress is unable to point to any causal connection between the conduct of representatives of Local 89 and any emotional distress he may have suffered.

Humphress' failure to establish these fundamental elements of his cause of action are fatal to this claim.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. The Petitioner has not shown any conflict among courts of appeals that could affect the outcome of this case or any other basis for reversal.

Respectfully submitted,

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